IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§	CASE NO. 20-33948-11
	§	HOUSTON, TEXAS
FIELDWOOD ENERGY, LLC, AND	§	
THE OFFICIAL COMMITTEE OF	§	
UNSECURED CREDITORS,	§	TUESDAY,
	§	AUGUST 24, 2021
DEBTORS.	§	8:58 A.M. TO 9:11 A.M.

COURT'S RULING (VIA ZOOM)

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

RECORDED VIA COURTSPEAK; NO LOG NOTES

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(Please also see Electronic Appearances.)

HOUSTON, TEXAS; TUESDAY, AUGUST 24, 2021; 8:58 A.M.

THE COURT: If I can go ahead and get the parties that are intending to speak today to go ahead and press five star, we'll get your line enabled.

(Pause in the proceedings.)

THE COURT: From 214-746-2503, I don't have a name associated with that number.

MR. GENENDER: Your Honor, it's Paul Genender of Weil. Good morning.

THE COURT: Good morning.

All right. So we're going to call the Fieldwood Energy case. It's 20-33948.

We have Mr. Duewall, Mr. Genender, Mr. Manns, and Mr. Perez who have asked for the ability to go ahead and address the Court today.

Are there any preliminary announcements? Are we ready to move right into the hearing?

MR. GENENDER: I think from the Debtor's perspective, we're ready, Judge.

THE COURT: All right. Anyone else?

(No audible response.)

THE COURT: So the parties had asked for the Court if you-all hadn't resolved matters by today to announce its decision on whether to lift the stay and allow the arbitration to proceed.

I am going to lift the stay to allow the arbitration to proceed. The Court has jurisdiction over this matter pursuant to 20 USC Section 1334. This was a core matter when it was filed under 20 USC Section 157 and although the dispute arose pre-confirmation, the core -- the nature of the dispute did not change with confirmation of the Plan.

Pursuant to Rule 7052(a)(1), as incorporated into the 9000 series, I make these oral Findings of Fact and Conclusions of Law and a separate Order will be issued.

Under the Federal Arbitration Act, there is a strong presumption in favor of arbitration and a party seeking not to enforce an Arbitration Agreement bears the burden of establishing the reasons why. When there is a valid agreement to arbitrate, as here, -- and no one argues that it's not a valid agreement -- the Federal Arbitration Act leaves no place for the exercise of discretion as to whether to mandate the arbitration.

There is somewhat of a bankruptcy exception, but arbitration generally applies in bankruptcy cases, unless there's something unique about the dispute such that it must be resolved as part of the bankruptcy process itself.

The Fifth Circuit has explicitly held since 1997 that arbitration clauses apply in bankruptcy, and I refer to the *National Gypsum* case at 118 F.3d 1056.

In those cases permitting arbitration, courts have typically found little difficulty with arbitration of disputes where resolution would not involve matters of Federal Bankruptcy law.

The Fifth Circuit in 2019 in *In Re: Henry*, at 944 F.3d 587 clarified when you would make this exception. We have held that Bankruptcy Courts may decline to enforce arbitration clauses when two requirements are met: First, the proceeding must adjudicate statutory rights conferred by the Bankruptcy Code, and not the Debtors' pre-petition legal or equitable rights citing back to *National Gypsum*.

A trustee in bankruptcy has two kinds of causes of action: Those inherited from the Debtor and those granted by statute.

Second, Bankruptcy Courts may decline to enforce arbitration provisions only if requiring arbitration would conflict with the purposes of the Bankruptcy Code, referring back to *Gandy* at 299 F.3d 489, a 2002 Fifth Circuit case.

Those purposes would include the goal of centralized resolution of purely bankruptcy issues, they need to protect creditors from reorganizing Debtors from piecemeal litigation and the undisputed power of a Bankruptcy Court to enforce its own Order.

So without more in this case, arbitration would apply. The argument, of course, is -- that we have to focus

on, is whether there has been any sort of a waiver or lack of enforcement of the arbitration provision.

It's interesting that on the same day this motion was filed, May 28th, the Fifth Circuit came out with its most recent pronouncement in this area. So the parties filing the motion weren't aware of it, but it literally occurred on the same day, and that's the *International Energy Ventures Management* case at 999 F.3d 257, 2021 Fifth Circuit case.

In that case they found that there had, in fact, been a waiver, but they also established the principles. Waiver of arbitration is a disfavored finding, according to the Fifth Circuit, but we will find it when the parties seeking arbitration substantially invokes the judicial process to the detriment or the prejudice of the other party.

Substantial invocation and prejudice are questions of Federal law in every case where the FAA applies. There are Federal questions in this case. The substantial invocation analysis in this case is straightforward. Substantial invocation occurs when a party performs an overt act in court that advances a desire to resolve the arbitral dispute through litigation, rather than arbitration, referring back to *Nicholas* at 565 F.3d 907.

It is difficult to see, held the Fifth Circuit in

that case, how a party could more clearly event such a desire than by filing a lawsuit, go into the merits of an otherwise arbitral dispute.

So outside of the rare case in which initiating litigation, quote:

> "Would not be inconsistent with seeking arbitration, the act of a Plaintiff filing suit without asserting an arbitration clause, constitutes substantial invocation of the judicial process."

The principle argument against enforcing the Arbitration Agreement arises out of the earlier motion filed by the Debtor seeking to compel performance by its counterparty.

For several reasons, I reject that argument. First, and perhaps most importantly, I find that either the Debtors breached the Arbitration Agreement by coming to me and seeking that earlier relief, or alternatively sought preliminary relief in aid of arbitration.

There really isn't any other way to look at this in my mind. The parties' agreement contains an arbitration clause that I want to read into the Record:

> "The arbitration process is binding on the parties and this arbitration is intended to be a final resolution of any dispute between the parties as described above, to the same extent as a Final Judgment of a Court of

competent jurisdiction."

And then the critical sentence:

"Each party hereby expressly covenants that it shall not resort to court remedies, except as provided for herein, and for preliminary relief in aid of arbitration."

Fieldwood resorted to court remedies. Now maybe they did so in breach of the agreement, and maybe they did so because they were seeking preliminary relief in arbitration.

In the end I conclude that this was preliminary relief in arbitration, but largely it won't matter in terms of the outcome of the decision. It would surely be totally inconsistent with the Federal policy of enforcing arbitration clauses to say that there was somehow a waiver when the counterparty breaches the Arbitration Agreement and then the responding party comes in and defends itself in light of the breach.

It was not up to Mr. Duewall's client to come in and to say, "Wait, we're invoking arbitration." It was up to Fieldwood not to come to court in the first place; or Fieldwood had the right to come and seek preliminary relief in aid of arbitration.

Although Fieldwood sought a form of affirmative relief, I nevertheless find that it was preliminary relief

in aid of arbitration. Fieldwood was trying to avoid the loss of valuable rights. They had the right to try and avoid that and they needed to come to court to lose the avoidance of those rights without then having the -- and then retain the ability to go to arbitration later.

I will acknowledge I think that's a pretty close call. But it is not a close call that Fieldwood either breached or came in aid of arbitration. My call is Fieldwood did not breach, but instead, came in preliminary aid of arbitration.

Second, I find that BP did not seek any affirmative relief from the Court and they stated this earlier at a preliminary hearing. I think seeking to minimize preliminary relief against BP is nowhere near the equivalent of what occurs when BP would have initiated its own lawsuit.

In these cases, the waiver of a party -- cases where that's been found -- is when that party initiates a proceeding to obtain affirmative relief.

For BP to come in and say, "Don’t do this to us," or "If you're going to do it to us, do it in this less harmful way to us," is not invoking the aid of the Court, it's trying to get the Court to do less, not to do more. I just don't think there is any way that that is a waiver of a substantial right.

Because I am lifting the stay in favor of arbitration, I decline to rule on the Motions to Quash. They'll be up to the arbitration process. I will issue a separate Order that grants relief from the stay to allow the parties to proceed in arbitration.

I think that terminates everything we had scheduled for today, but you-all let me know if I've missed something here.

MR. GENENDER: Your Honor, Paul Genender for the Debtors. Thank you for going through that.

May I ask a clarification question?

THE COURT: Of course.

MR. GENENDER: So your ruling in declining to address the Motions to Quash, my question relates to the fact that the 2004 discovery sought did not relate to agreements that have arbitration clauses in them; namely, the Debtor's position is it relates to the PSA that does not have arbitration clause in it. And for that reason, wouldn't be subject to your lift stay ruling.

THE COURT: Well, I understand that position that you-all have taken, but I don't think that you have supported it with the request that you have made in light of what the PSA says with respect to waivers.

I get it, and if you want to file a motion for me to reconsider this, I'm not going to at all be offended on

that, but if you look at the PSA itself, I'm not sure what damages you're actually seeking to prove up by doing the discovery, if this is solely under the PSA.

And I think it is more likely to be discovery that is related to the termination dispute.

So I'll let you file a Motion for Reconsideration on that issue. I did not address it fully in my Findings of Fact and Conclusions of Law. I did think about it, but because of that, I'm going to go ahead and deny them now. But I -- you know, it took me a long time to make this ruling. That's because the lawyering has been so good, so I'm not going to be upset if you file a Motion to Reconsider. I'll let them respond to it.

But for now I think that that discovery in large part is going to go to the termination question.

MR. GENENDER: Okay. Thank you, Judge. We'll huddle on our end and decide how we want to proceed, and obviously I have some points that I was prepared to make on -- in response to the Motion to Quash, but in light of your ruling --

THE COURT: Right.

MR. GENENDER: -- I'm not going to do it today.

THE COURT: I think that's fair and, you know, I'm not sure why the parties wanted me to wait this long to rule, but you-all asked me to rule today and that's what I

wanted to do. And I think it does moot other things that you-all might have prepared to do.

All right. Thank you very much.

We're in adjournment.

(The parties thank the Court.)

(Hearing adjourned at 9:11 a.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability from the electronic sound recording of the ZOOM/telephonic proceedings in the above-entitled matter.

/S/ MARY D. HENRY

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